

A Hail Mary Pass: Public Policy Review of Arbitration Awards

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I. INTRODUCTION

Since the Supreme Court's decision in *United Paperworkers International Union v. Misco*,¹ it has been well established that courts can review arbitration awards for violations of public policy. *Misco* provides the framework for determining whether awards can be vacated on public policy grounds in spite of the traditional judicial deference accorded to arbitration. As explained in *Misco*, courts have only a limited role in reviewing arbitration decisions because excessive judicial interference would undermine the use of arbitration as an alternative means for settling disputes.² Still, the Supreme Court also stated that a court may vacate an award if it is shown that the award violates explicit, well-defined, and dominant public policy ascertained from law and legal precedents.³

The Supreme Court recently revisited some of the questions surrounding public policy review of arbitration awards in *Eastern Associated Coal Corporation v. UMWA, District 17*.⁴ In this decision the Supreme Court unanimously affirmed the basic test of *Misco* that an award may only be vacated on public policy grounds if it violates some explicit, well defined, and dominant source of public policy ascertained from positive law and not general concerns for supposed public interests.

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The Author dedicates this article to Professor Daniel G. Collins of New York University School of Law and wishes Professor Collins all the best in his recent retirement from full time teaching following nearly forty years at NYU.

¹ *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

² *Id.* at 37-38. In *Misco* the Court conducted a lengthy analysis of its decision in *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1963). The Court concluded that the deference shown to arbitrators is itself compelled by the dominant public policy favoring private settlement of labor disputes as expressed by Congress in the Labor Management Relations Act of 1947, 29 U.S.C. §173(d). *Id.*

³ *Id.* at 43.

⁴ *E. Associated Coal Corp. v. UMWA, Dist. 17*, 121 S. Ct. 462 (2000).

Public policy scrutiny under *Misco* was intended to be a narrow exception to the traditional judicial deference accorded to arbitration decisions.⁵ This intent was clearly confirmed by all nine Justices in *Eastern Associated Coal*.⁶ However, deciding what constitutes sufficiently well-defined and dominant public policy for reversing an award, and whether that award does indeed violate public policy, remains difficult as the use of arbitration as a means of alternative dispute resolution grows. Arbitration is now a widespread device for resolving disputes in numerous fields. Awards are therefore more likely to implicate and possibly violate one or more of the numerous expressions of public policy embodied in the growing myriad of statutes, regulations, and common law doctrines governing parties' contractual relationships.

This Article will discuss how courts have interpreted the principal elements of public policy scrutiny outlined in *Misco*, as well as the burdens faced by parties seeking vacatur of awards on public policy grounds. These burdens vary because the federal circuit courts have taken different views of areas where *Misco* was silent. Some of these cases must be re-examined in light of *Eastern Associated Coal*, which clarified the appropriate inquiry for courts engaged in public policy review in a way which runs contrary to the approaches taken by some federal circuit courts. Also discussed are trends in decisions reviewing awards implicating specific public policy issues such as workplace safety, sexual harassment, employee drug use, and violence in the workplace. Though arbitrators retain broad discretion when issuing their awards and the scope of public policy review will always be very narrow,⁷ current case law demonstrates that if certain public policies are violated, parties can still overcome the strong deference courts show toward arbitration.

⁵ *Misco*, 484 U.S. at 42–43 (“[I]t is apparent that our decision in [*W.R. Grace*] does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy.”) (discussing an important legal point derived from the decision in *W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757, 766 (1983)).

⁶ Justice Breyer, writing for the majority of seven justices and joined in the result by a concurring opinion by Justice Scalia, noted that the relief of public policy vacatur was appropriate only in “rare” instances. *E. Associated Coal*, 121 S. Ct. at 466.

⁷ *Nat’l Football League Players Ass’n v. Pro-Football, Inc.*, 857 F. Supp. 71, 75–76 (D.D.C. 1994), *vacated on other grounds*, 56 F.3d 1525 (D.C. Cir. 1995) (comparing the likelihood of success of vacating an award with a public policy argument to the likelihood of completing a “Hail Mary” pass in a football game, a desperate attempt to score that is rarely successful).

II. FOUNDATIONS OF PUBLIC POLICY REVIEW

In order to overturn an arbitration award on public policy grounds, *Misco* requires a showing that the award violates explicit, well-defined, and dominant public policy rooted in law and legal precedents.⁸ Such policy must be clearly articulated by any party seeking vacatur. What constitutes explicit, well-defined, and dominant public policy varies, but courts have held such policy exists when the alleged rule is expressed in statutes, regulations, or clear common law doctrines.⁹

In *Eastern Associated Coal*, the split among the Justices centered solely on the appropriate definition of public policy. Justice Breyer's majority opinion in *Eastern Associated Coal*, joined by six Justices, affirmed the lower court's application of the *Misco* standard to mean vacatur is appropriate when an award violates "positive law."¹⁰ For the employer in *Eastern Associated Coal*, this meant seeking prohibitions in federal statutes and federal regulations governing drug testing of licensed commercial drivers against the reinstatement of repeat drug users, and the Justices found no such prohibition.¹¹ If the majority had stopped there, *Eastern Associated Coal* could be interpreted as rejecting any public policy challenges not based on statutory or regulatory prohibitions on the terms of an award.

But then the majority indicated it would be permissible for courts to find public policy violations in situations where awards did not violate positive law.¹² Justice Scalia in his concurring opinion criticized the majority for in effect inviting what he deemed to be "flaccid" public policy challenges based not on clear statutory or regulatory prohibitions. In his view public policy violations only occur when an award is clearly contrary to "actual prohibitions of the law."¹³

In light of *Eastern Associated Coal*, which demonstrated that well-defined and dominant public policy governs an issue, it can be a significant hurdle for parties seeking vacatur, particularly in cases where the alleged public policy is not rooted in statutes, regulations, or clear common law but

⁸ *Misco*, 484 U.S. at 43.

⁹ See, e.g., Deanna J. Mouser, *Analysis of the Public Policy Exception After Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator*, 12 INDUS. REL. L.J. 89 (1990).

¹⁰ *E. Associated Coal*, 121 S. Ct. at 467.

¹¹ *Id.* at 468-69.

¹² *Id.* at 469. ("We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.")

¹³ *Id.* at 470 (Scalia, J., concurring).

rather is only expressed in the internal policies of an employer or trade association, or in general concerns about supposed public interests.¹⁴ Moreover, while the Supreme Court in *Eastern Associated Coal* left open the door for successful public policy challenges absent express statutory prohibitions against the terms of awards, there is clearly only limited chance for success absent positive law expressly militating against enforcement of an award.

The other key question when challenging awards on public policy grounds is whether a party needs to demonstrate that the terms of the award itself, such as the remedy offered by the arbitrator, violates the public policy at issue. The Justices in *Misco* were purposefully silent on whether courts should consider the terms of an arbitrator's decision, the reasoning therein, or the conduct which is the subject of the dispute, when looking for violations of the articulated public policy.¹⁵ The discrepancies among various federal circuit courts in public policy cases derive largely from whether the particular reviewing court determines that it must compare the terms of an award to the relevant public policy, instead of simply comparing the public policy goals to the conduct at issue. This unresolved question following *Misco* created a split among the federal circuit courts.

Most federal circuit courts used what is deemed the narrow approach to public policy review by comparing the terms of the award to the public

¹⁴ See, e.g., *Paine Webber, Inc. v. Agron*, 49 F.3d 347, 351-52 (8th Cir. 1995) (specifying that National Association of Securities Dealers rules and employer policies based thereon do not constitute public policy to overturn the reinstatement of a dishonest securities broker; even though the need for honesty in the securities industry is a dominant policy, it is not sufficiently well-defined to satisfy *Misco*); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 382 (3d Cir. 1995) (observing that general considerations for public safety do not provide sufficiently explicit public policy grounds to vacate an award reinstating a bus driver who was involved in repeated rear-end collisions); *Ariz. Elec. Power Coop. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995) (holding that no well-defined and dominant public policy exists forbidding the collection of fees by unethical attorneys); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1414 (8th Cir. 1997) (finding no well-defined and dominant public policy of job protection based on job security and seniority provisions in a collective bargaining agreement); *Major League Umpires Ass'n v. Prof'l Baseball Clubs*, No. 96-7437, 1997 U.S. Dist. LEXIS 14215, at *7 n.10 (E.D. Pa. Aug. 27, 1997), *aff'd*, 159 F.3d 1352 (3d Cir. 1998) (noting that the public policy exception is inappropriate for review of an award denying back pay to professional baseball umpires because presumably no well-defined and dominant public policy exists requiring payment of umpires for unplayed games).

¹⁵ *United Paperworks Int'l Union v. Misco*, 484 U.S. 29, 45 n.12 (1987) ("We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.").

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policy at issue. In the Ninth Circuit a court must find that a clear, well-defined, and dominant public policy exists and that the terms of an award are directly contrary to that policy in order for an award to be vacated on public policy grounds.¹⁶ As such, except in the unlikely event that a statute or regulation expressly forbids the decision rendered by the arbitrator, courts must defer to the arbitrator's award. A similar narrow approach is followed in the Second Circuit, where awards will be vacated on public policy grounds only in the "rare cases" in which their enforcement would be "directly at odds" with some well-defined and dominant public policy.¹⁷

Additionally, if a court is required to compare the terms of the award to the given policy, it may be necessary for the court to conclude that the award undermines the entire underlying purpose of that public policy in order to vacate the award on these grounds. Consequently, awards that somehow limit the ability of an employer to achieve what public policy requires of it, but do not entirely prohibit the employer from doing so, need not be vacated. The New York Court of Appeals took this position recently in refusing to vacate arbitration awards on public policy grounds, perhaps creating an additional burden on parties seeking vacatur on this basis.¹⁸

In *Eastern Associated Coal* the Supreme Court adhered to the so called narrow approach applied by the Fourth Circuit and most other federal circuit courts, namely that a reviewing court must find the terms of an award, not the underlying conduct at issue, violated public policy.¹⁹ In clarifying the focus for public policy review Justice Breyer noted that since the parties had "bargained for" the "arbitrator's construction" of the agreement in awards, a court must assume the challenged award is part of the agreement.²⁰ Therefore, it is the terms of the agreement itself, expressed by an arbitrator's interpretation, which is subject to court review on public policy grounds.²¹ In light of *Eastern Associated Coal*, case law which has found violations of public policy in awards based on the underlying conduct, rather than

¹⁶ *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995); *see also* *United Transp. Union v. Union Pac. R.R.*, 116 F.3d 430, 433 (9th Cir. 1997) (citing *United Food & Commercial Workers Int'l Union*, 74 F.3d at 174).

¹⁷ *Saint Mary Home, Inc. v. SEIU*, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997).

¹⁸ *Prof'l, Clerical, & Technical Employees Ass'n v. Buffalo Bd. of Educ.*, 683 N.E.2d 733, 745 (N.Y. 1997); *New York State Corr. Officers & Police Benevolent Ass'n v. New York*, 726 N.E.2d 462, 467 (N.Y. 1999).

¹⁹ *E. Associated Coal Corp. v. UMW*, Dist. 17, 121 S. Ct. 462, 467-68 (2000).

²⁰ *Id.* at 466 (citation omitted).

²¹ *Id.* at 467. ("[W]e must treat the arbitrator's award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words For present purposes, the award is not distinguishable from the contractual agreement.") (citation omitted).

comparing the terms of the award to the public policy at issue, is now suspect.

III. PUBLIC POLICY REVIEW OF COMMERCIAL ARBITRATION AWARDS

Vacatur of a labor arbitration award on public policy grounds is very unlikely given the narrow scope of this exception in post *Misco* jurisprudence. It is even less likely when courts review commercial arbitration awards. This is because the public policy exception has very limited relevance in the context of commercial arbitration. In *Misco* Justice White noted that court authority to review awards for violations of public policy stems from the doctrine that courts will not "lend . . . aid to one who founds a cause of action upon an immoral or illegal act."²² Actions for breaches of commercial contracts rarely implicate such concerns.²³ In addition, courts have declared that the Federal Arbitration Act manifests a strong federal policy favoring arbitration of commercial disputes.²⁴

Still, parties often contend that commercial arbitrators violate public policy by enforcing or suspending commercial contractual obligations, albeit with little success.²⁵ For example, the plaintiff in one commercial case contended unsuccessfully that an arbitrator violated public policy by awarding damages which put the prevailing party in a better position than if the contract had not been breached.²⁶ The plaintiff also contended, without success, that it was a violation of public policy for the arbitrator to have awarded more damages than could have been won by the prevailing party in a judicial proceeding.²⁷

Parties seeking vacatur of commercial arbitration awards have also advanced unsuccessful public policy arguments based on allegedly improper evidentiary admissions. In *Gallus Investments, L.P. v. Pudgie's Chicken*,

²² *Misco*, 484 U.S. at 42.

²³ See *Widell v. Wolf*, 43 F.3d 1150, 1152 (7th Cir. 1994) (characterizing as "frivolous" an appeal seeking vacatur on public policy grounds of an award granting damages to the customer of a commodities broker who engaged in unauthorized trades).

²⁴ 9 U.S.C. §1-16 (1994 & Supp. 2000). For a discussion of Congressional intent to express policy favoring arbitration of commercial disputes, see *Southland Corp. v. Keating*, 465 U.S. 1 (1984); see also *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996).

²⁵ See *Bd. of County Comm'rs v. Kimball & Assocs.*, 860 F.2d 683, 686-88 (6th Cir. 1988) (holding that service contracts entered into by a municipality that were ultra vires and had indefinite terms did not violate public policy).

²⁶ *Team Scandia, Inc. v. Greco*, 6 F. Supp. 2d 795, 802 (S.D. Ind. 1998).

²⁷ *Id.* at 802.

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Inc.,²⁸ an award resolving the parties' dispute under a franchise agreement was challenged as lacking "fundamental fairness" because the arbitration panel considered evidence of a settlement offer.²⁹ The plaintiff argued this was a violation of New York evidentiary law, the jurisdiction governing the contract, and also that allowing such a practice in arbitration would chill settlement negotiations as well as undermine policies favoring the use of alternative dispute resolution.³⁰ The court noted this evidentiary law public policy argument was vague at best and did not approach the level of a *Misco* public policy violation.³¹ Such cases demonstrate how unlikely it is that courts will set aside commercial awards on public policy grounds, despite creative efforts by the losing parties to identify policy violations in commercial awards.³²

IV. WORKPLACE SAFETY AND PUBLIC POLICY

It is important to consider the strength and breadth of the public policy at issue when assessing whether an award is likely to be vacated. With a stronger and broader public policy, courts may be wary of any potential dilution of the policy's purposes. Such concerns are evident in a series of cases dealing with employees in safety sensitive jobs. Some courts reviewing awards that reinstated employees to safety sensitive jobs choose to apply a broad approach to public policy review. This involves comparing the conduct at issue to the relevant public policy. Using this approach, contrary to how public policy review was applied in *Eastern Associated Coal*, courts have vacated awards reinstating employees whose conduct created serious risks of harm to others by jeopardizing safety in the workplace.

For instance, in *Iowa Electric Light and Power Co. v. Local Union 204*,³³ the Eighth Circuit affirmed vacatur of an award reinstating a nuclear power

²⁸ *Gallus Investments, L.P. v. Pudgie's Chicken, Inc.*, 134 F.3d 231 (4th Cir. 1998).

²⁹ *Id.* at 234.

³⁰ *Id.* at 233–34.

³¹ *Id.* at 234 n.*.

³² *E.g.*, *Bowles Fin. Group v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994) (holding that consideration of a settlement offer does not violate public policy or deprive a party of a fundamentally fair arbitration hearing); *Nitram, Inc. v. Indus. Risk Insurers*, 848 F. Supp. 160, 166 (M.D. Fla. 1994) (ruling that an arbitration panel's consideration of testimony by an expert witness did not violate public policy); *Enviro Petroleum, Inc. v. Kondur Petroleum S.A.*, 91 F. Supp. 2d 1031, 1036 (S.D. Tex. 2000) (rejecting contention that contractual arbitration provision allowing for arbitration under the Rules of Arbitration of the International Chamber of Commerce was contrary to public policy because awards issued thereunder would be unenforceable in Indonesia, the country where the defendant was based).

³³ *Iowa Elec. Light & Power Co. v. Local Union 204*, 834 F.2d 1424 (8th Cir. 1987).

plant employee who deliberately disregarded federal safety regulations and his supervisor's instructions by initiating the release of a pressurized door lock meant to prevent radioactive leaks. The court found that the Nuclear Regulatory Commission guidelines promulgated for compliance with the Atomic Energy Act mandated such safeguards, and these guidelines constituted explicit, well-defined, and dominant public policy.³⁴ These regulations had been deliberately disobeyed by the discharged employee, and the court reasoned that this "knowing violation of a safety rule" mandated by clear public policy required his discharge.³⁵

Courts in these safety sensitive employment cases are often presented with the argument that employers and the public should not bear the risk of an employee repeating conduct which could harm others. Nevertheless, despite the strong public policy at issue when public safety is potentially jeopardized by an employee's conduct, the determining factor for most courts in safety cases has been whether the employer can demonstrate some sufficiently well-defined and dominant public policy requiring removal of employees who create severe risks to co-workers or the general public.

The Second Circuit addressed this issue when reviewing the reinstatement of a nuclear power plant employee to a safety sensitive job who, upon being selected for a drug test, altered his urine sample and then subsequently tested positive for cocaine. In *IBEW, Local 97 v. Niagara Mohawk Power Corp. (Niagara Mohawk I)*,³⁶ an arbitration panel reviewed the discharge of Patrick Rando, a chemistry technician at a nuclear power plant who falsified his drug test specimen. Rando's job required chemical testing of various operational mechanisms at the plant to ensure compliance with Nuclear Regulatory Commission (NRC) safety guidelines.³⁷

All employees were subject to random testing pursuant to other NRC rules intended to guarantee employee fitness and plant safety.³⁸ Rando was selected to undergo drug testing but the sample he submitted was later determined to be tainted by chemicals meant to conceal any traces of drugs.³⁹ He was required to submit a second sample under observation, and this one tested positive for cocaine.⁴⁰ The company immediately terminated him on the grounds he had deliberately falsified a federally mandated drug test, and

³⁴ *Id.* at 1428.

³⁵ *Id.* at 1429.

³⁶ *IBEW, Local 97 v. Niagara Mohawk Power Corp. (Niagara Mohawk I)*, 143 F.3d 704 (2d Cir. 1998), *rev'g* 950 F. Supp. 1227, 1234 (N.D.N.Y. 1996).

³⁷ *Id.* at 707.

³⁸ *Niagara Mohawk I*, 143 F.3d at 707.

³⁹ *Id.*

⁴⁰ *Id.* at 707.

that such deceitful conduct made him too untrustworthy and unreliable for his safety sensitive position in a nuclear facility.⁴¹

However, the arbitration panel reviewing his grievance found no just cause existed for discharge because the employer's drug testing guidelines, created in order to comply with the NRC regulations, did not list termination as a penalty for adulterating a test sample.⁴² These guidelines only stated such conduct was to be treated like a positive test, the first of which would result in a suspension of up to two weeks and subsequent monitoring of the employee.⁴³ The panel ordered conditional reinstatement provided he passed another drug test, and as additional discipline Rando was ordered to undergo further testing and evaluation for eighteen months.⁴⁴ If he failed another drug test he could then be discharged.⁴⁵

The employer refused to reinstate Rando and instead sought vacatur of the award. The district court vacated the award, concluding it was barred by express, well-defined, and dominant public policy against employment of persons at nuclear facilities who deliberately violated safety regulations.⁴⁶ The district court agreed with the employer that Rando's conduct demonstrated he was not sufficiently trustworthy or reliable enough to resume his former employment, and that reinstating him would be contrary to public policy.⁴⁷

The Second Circuit reversed the district court in a lengthy opinion discussing the role of courts engaged in public policy review under *Misco*.⁴⁸ The court defined this task as determining whether the terms of the award itself, rather than the reasoning underlying it, expressly conflicts with clear, well-defined, and dominant public policy.⁴⁹ It also concluded that this analytical framework for public policy review under *Misco*, requiring examination of the end result of an award for violations of public policy, was the only approach that could balance traditional court deference to arbitration with concerns about public policy, despite the holdings of some federal circuit courts to the contrary.⁵⁰

⁴¹ *Id.* at 708.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Niagara Mohawk I*, 950 F. Supp. 1227, 1234 (N.D.N.Y. 1996), *rev'd* 143 F.3d 704 (2d Cir. 1998).

⁴⁷ *Id.* at 1236.

⁴⁸ *Niagara Mohawk I*, 143 F.3d 704, 714–17.

⁴⁹ *Id.* at 716–17.

⁵⁰ *Id.* at 717. The Second Circuit distinguished *Iowa Electric* and other cases addressed in this article.

Using this test the court determined that the NRC regulations requiring drug testing, the clearest source of public policy relevant to the award, neither mandated termination for adulterating drug tests nor forbade conditional reinstatement after a negative test.⁵¹ Moreover, the company's argument that Rando's deceptive conduct made him so untrustworthy that his reinstatement contravened public policy was deemed unpersuasive, even though the regulations clearly called for employees to be trustworthy.⁵² In the court's view the importance of trustworthiness and reliability expressed in the NRC regulations did not indicate in an explicit, well-defined manner that dishonest conduct during a drug test would make an employee so untrustworthy to preclude reinstatement.⁵³ Despite his deceit Rando could be conditionally reinstated because no rule or regulation made such dishonesty a violation of public policy.⁵⁴

The Second Circuit closely followed its reasoning in *Niagara I* in a subsequent case involving an award reinstating a nuclear plant safety officer who had failed to properly respond to a fire alarm and then lied to investigators about his actions. In *Local 97, IBEW v. Niagara Mohawk*

⁵¹ *Id.* at 718. According to the NRC Regulations, fitness-for-duty programs must do the following:

(a) Provide reasonable assurance that nuclear power plant personnel . . . will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal . . . which in any way adversely affects their ability to safely and competently perform their duties;

(b) Provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part; and

(c) Have a goal of achieving a drug free workplace and a workplace free of the effects of such substances.

General Performance Objectives, 10 C.F.R. § 26.10 (2000).

⁵² *Niagra Mohawk I*, 143 F.3d at 719–20 n.15.

⁵³ *Id.* at 721.

⁵⁴ *Id.* at 722. Other public policy challenges based on an employee's dishonest conduct have also been unsuccessful. *E.g.*, *Great Atl. & Pac. Tea Co. v. Local 338, Retail, Wholesale & Dep't. Store Union*, 1996 U.S. Dist. LEXIS 7207 (S.D.N.Y. May 23, 1996). Here the enforcement of an award reinstating an illegal alien who was discharged for giving false information on an employment application and other forms in order to conceal his illegal residency in the U.S. was held not contrary to public policy against the employment of illegal aliens and against misrepresentations by persons seeking employment. *Id.* at *7. The court reasoned that though immigration law forbade hiring illegal aliens as well as using false documents, the grievant's reinstatement would not interfere with the employer's ongoing obligation to comply with the relevant statutes. *Id.* at *6–*7.

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Power Corp. (Niagara Mohawk II),⁵⁵ the employer again refused to accept the arbitrator's award reinstating the employee and instead sought vacatur on public policy grounds, citing the same NRC regulations requiring trustworthiness of nuclear plant employees. This argument was again accepted by the district court which vacated the award.⁵⁶

The Second Circuit, as it did in *Niagara Mohawk I*, reversed the district court and affirmed the award. The court again noted that the public policy exception to judicial deference to arbitration is "extremely limited," and reiterated its view that *Misco* requires courts to compare the terms of an arbitrator's award to relevant sources of public policy when assessing whether the award is contrary to public policy.⁵⁷ After re-examining the NRC guidelines requiring employees to be both "trustworthy" and "reliable," as well as the results of several NRC enforcement actions brought against nuclear plant employees who committed acts of dishonesty or nonperformance of safety duties,⁵⁸ the court again determined that no explicit provision in the regulations forbade reinstating dishonest employees.⁵⁹

The Second Circuit in both *Niagara Mohawk I* and *Niagara Mohawk II* distinguished *Iowa Electric* on the grounds the Eighth Circuit in that case had largely based its holding on the individual employee's egregious conduct.⁶⁰ Indeed, a subsequent decision of the Eighth Circuit demonstrates that so long as arbitrators do not reinstate employees who deliberately disregard safety in violation of some clear and well-defined expression of public policy, that court is also unlikely to vacate such awards on public policy grounds.⁶¹

Iowa Electric and both *Niagara Mohawk I* and *Niagara Mohawk II* illustrate, in part, how the differing approaches taken by circuit courts to public policy review can produce different results. This difference reflects the uneven development of law where *Misco* was silent, namely on what exactly in an award must violate public policy to require vacatur. The law is

⁵⁵ Local 97, *IBEW v. Niagara Mohawk Power Corp. (Niagara Mohawk II)*, 196 F.3d 117 (2d Cir. 1999), *rev'g* No. 96-CV-728 HGM-GJD, 1997 WL 793137 (N.D.N.Y. Dec. 16, 1997).

⁵⁶ *Niagara Mohawk II*, 196 F.3d at 122.

⁵⁷ *Id.* at 125.

⁵⁸ *Id.* at 127-29.

⁵⁹ *Id.* at 130.

⁶⁰ *Niagara Mohawk I*, 723 (2d Cir. 1998); *Niagara Mohawk II*, 196 F.3d 117, 131 (2d Cir. 1999).

⁶¹ See *Homestake Mining Co. v. United Steelworkers, Local 7044*, 153 F.3d 678, 681 (8th Cir. 1998) ("Although we have expressed public policy concerns about an award that reinstated an employee despite a finding that the employee grossly and deliberately violated important safety regulations . . . in the absence of such a finding here, no similar concerns arise.") (citation omitted).

now more consistent in the context of safety at nuclear facilities,⁶² and the Supreme Court's analysis in *Eastern Associated Coal* should promote future uniformity since it instructs courts to look to the terms of the agreement, as expressed in the award.

Should courts continue to review awards reinstating employees to safety sensitive positions on various job sites using different public policy tests, they will still produce uneven results. Many decisions implicate drug use, an issue which can be addressed in both the safety sensitive and non-safety sensitive employment contexts. In one such case a court vacated the reinstatement of an employee whose safety sensitive job involved monitoring high pressure equipment at a power plant.⁶³ This employee operated electrical equipment and was found to have a chronic drug problem.⁶⁴ He had drugs in his car at work, and was found to have been under the influence of drugs while on duty monitoring pressure and temperature gauges.⁶⁵ The court reasoned that reinstating this employee violated public policy because he created danger in the workplace, and it would compel the employer to tolerate illegal drugs on its premises.⁶⁶

Further, in two very similar cases, *Gulf Coast Industrial Workers Union v. Exxon Co.*,⁶⁷ and *Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union*,⁶⁸ the Fifth Circuit vacated arbitration awards that reinstated employees with back pay after each had failed drug tests. Both employees worked in safety sensitive positions at chemical facilities.⁶⁹ In *Gulf Coast Industrial Workers Union*, the employee was a technician with control over the flow of highly volatile gases;⁷⁰ in *Baton Rouge Oil & Chemical Workers*

⁶² Compare *Niagara Mohawk I*, 143 F.3d 704 (2d Cir. 1998), and *Niagara Mohawk II*, 196 F.3d 117 (2d Cir. 1999), with *Homestake Mining*, 153 F.3d 678; see also *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 521 (6th Cir. 1999) (refusing to vacate on public policy grounds an award reinstating a nuclear power plant employee who failed a drug test, following *Niagara I*).

⁶³ *Georgia Power Co. v. IBEW, Local 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd*, 896 F.2d 507 (11th Cir. 1990).

⁶⁴ *Id.* at 533-34.

⁶⁵ *Id.*

⁶⁶ *Id.* at 538.

⁶⁷ *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993).

⁶⁸ *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996).

⁶⁹ *Gulf Coast Indus. Workers Union*, 991 F.2d at 246; *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d at 851.

⁷⁰ *Gulf Coast Indus. Workers Union*, 991 F.2d at 247.

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Union, the grievant was a supervisor in a chemical purification department.⁷¹ Both tested positive for cocaine and were discharged.⁷²

The arbitrator in *Gulf Coast Industrial Workers Union* found just cause existed for discipline, but determined that discharge was too severe a penalty under the company's drug policy.⁷³ The Fifth Circuit affirmed vacatur by a lower court, finding that numerous federal and state statutes, company guidelines, and judicial decisions all demonstrated the existence of explicit, well-defined, and dominant public policy favoring eradication of illegal drugs from the workplace.⁷⁴ As such, the court reasoned that the reinstatement of an employee to a safety sensitive job with back pay after failing a drug test would undermine that policy.⁷⁵

The arbitrator in *Baton Rouge Oil & Chemical Workers Union* decided discharge was unwarranted because the employee had not violated the drug policy as drafted at the time he failed the drug test.⁷⁶ Here the Fifth Circuit only had before it the issue of back pay, and it still found a violation of public policy even though the employee did not return to his job and no longer posed a safety risk. The court reasoned that an award granting back pay created "retrospective approval" of the unsafe conduct.⁷⁷ This rationale was applied despite the unchallenged finding that the employee's discharge had been without just cause under the circumstances.⁷⁸

These two Fifth Circuit decisions starkly contrast with the narrow approach to the public policy exception applied by the Second Circuit in both *Niagara Mohawk I* and *II*. This contrast highlights the tension present in most court cases reviewing arbitration awards between allowing arbitration to function without excessive judicial interference and ensuring that public interests are protected from arbitrators who may undermine public policy in their awards. In striking this balance, the Justices in *Misco*, by virtue of their express instruction that the public policy exception is narrow, counseled

⁷¹ *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d at 851.

⁷² *Gulf Coast Indus. Workers Union*, 991 F.2d at 247; *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d at 851.

⁷³ *Gulf Coast Indus. Workers Union*, 991 F.2d at 247-48.

⁷⁴ *Id.* at 250-52 (discussing the Drug Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1994 & Supp. 2000); the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213; Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986) reprinted in 5 U.S.C. § 7301 (1994 & Supp. 2000); as well as various other Federal regulations and judicial opinions pertaining to drug use in the workplace).

⁷⁵ *Id.* at 254-55.

⁷⁶ *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d at 853 (upholding employees' discharge under these circumstances would have amounted to discipline without prior notice of the consequences of employees' actions).

⁷⁷ *Id.* at 856.

⁷⁸ *Id.* at 853.

judicial decision makers to avoid policy based decisions overreaching into arbitration because parties' have agreed to arbitration as the exclusive means for resolving their contractual disputes.

Assuming, as the Fifth Circuit did, that other employees will be encouraged to use drugs because one who did so received back pay when he was improperly discharged, seems like an attenuated basis for furthering the public policy of a drug free workplace. Since this relationship is indirect, it should be insufficient to overcome the traditional judicial deference to arbitration required to vacate these awards, despite the fact that both employees had safety sensitive jobs.⁷⁹ The broad approach of the Fifth Circuit in these decisions, while not expressly overruled by *Eastern Associated Coal*, is now suspect.

A drug free workplace is of paramount concern to employers, employees, and society as a whole, whether safety is implicated or not. Still, *Eastern Associated Coal* counsels that indirect safety concerns do not justify significantly broader interpretations of public policy than were intended by the Supreme Court in *Misco*.⁸⁰ As such, a job performance test with respect to drug use and workplace safety seems preferable under *Misco* for assessing arbitration decisions raising public policy considerations.

One federal circuit court has already applied such a test. In *Monroe Auto Equipment Co. v. UAW, Local 1878*,⁸¹ the Sixth Circuit refused to vacate an award reinstating a mechanic who worked on test cars at an auto plant who had been discharged for drug use. Despite the fact that the mechanic had failed a drug test and was in violation of an express company policy, according to the court his reinstatement did not violate any public policy because there was insufficient showing that his work performance was impaired.⁸²

Under this approach, absent a showing that the employee's work was, or is, likely to be impaired in a manner prohibited by public policy, there is nothing compelling a court to reject judicial deference and vacate an award

⁷⁹ It seems unlikely that an employee would be encouraged to use drugs because a coworker was reinstated following discipline that lacked just cause. Assuming some causal relationship between the drug use and the award of back pay as the Fifth Circuit did in *Baton Rouge Oil & Chem. Workers Union* seems like the type of judicial refusal, based on speculation, to enforce awards that *Misco* specifically proscribed. See *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 44-45 (1987).

⁸⁰ The Justices in *Eastern Associated Coal* noted in their particular statutory scheme governing U.S. Department of Transportation licensed commercial drivers, employee rehabilitation following drug use was as prominently emphasized as preventing accidents through additional testing. *E. Associated Coal Corp. v. UMWA*, Dist. 17, 121 S.Ct. 462, 468 (2000).

⁸¹ *Monroe Auto Equip. Co. v. UAW, Local 1878*, 981 F.2d 261 (6th Cir. 1992).

⁸² *Id.* at 269.

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under the public policy exception. The public policy exception is rooted in the common law doctrine that contracts which violate law or policy should not be enforced; therefore, only where enforcement of the award materially impairs public policy in a way proscribed by that policy, should deference to arbitrators' authority be withdrawn. This approach seems most consistent with *Misco*.⁸³

Some cases in which employers seek to vacate awards reinstating their employees involve safety and public policy, but not drug use. In *Stead Motors v. Automotive Machinists Lodge No. 1173*,⁸⁴ an auto dealer terminated a mechanic who, on more than one occasion, while repairing cars failed to properly re-secure lug nuts holding the wheels. The arbitrator agreed with the employer that the mechanic's conduct amounted to "reckless" behavior, but decreased the penalty from termination to a lengthy suspension.⁸⁵ The employer sought vacatur of the award with the argument that it violated a state public policy requiring safe maintenance of automobiles, and both the district court and a three judge panel of the Ninth Circuit agreed that such a policy existed and was violated by this conduct.⁸⁶

The Ninth Circuit, sitting en banc, reversed. It reasoned that arbitrators are entitled to "nearly unparalleled" deference by virtue of their unique role as non-judicial decision makers for the parties to a contract.⁸⁷ As such, the judges concluded from their reading of *Misco* that courts must find that overriding public policy bars the relief ordered by the arbitrator in order to vacate the award.⁸⁸ Finding no instruction in the public policy of California relating to automobile safety or maintenance that auto mechanics who discharged their duties recklessly must be discharged, the plurality opinion

⁸³ *Id.*; see also *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1024 (10th Cir. 1993) (rejecting the "broad" and "narrow" descriptions of public policy tests used by various courts as unhelpful in interpreting *Misco*'s demand that courts look for "explicit conflicts" between public policy and awards).

⁸⁴ *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (en banc).

⁸⁵ *Id.* at 1203.

⁸⁶ *Id.* at 1204 (discussing the circuit court panel decision at 843 F.2d 357 (9th Cir. 1988)).

⁸⁷ *Id.* at 1205-06.

What courts do when they review an arbitrator's award is more akin to the review of a contract than of the decision of an inferior tribunal: the award, just as a contract, is the expression of the parties' will and must be enforced as expressed unless illegal or otherwise void. Judicial "reinterpretation" . . . is ordinarily an invalid exercise of our power.

Id.

⁸⁸ *Id.* at 1212. ("If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*.").

concluded it had no basis to overrule the arbitrator's judgment that termination was unwarranted.⁸⁹

Two separate dissenting opinions, joined by a total of six judges were filed in *Stead Motors*. The first one favored vacatur and criticized the majority for not giving more consideration to state public policy mandating road safety, as well as to the dangers created by the discharged employee's conduct.⁹⁰

The second dissenting opinion agreed that the award did not conflict with any explicit, well-defined, and dominant public policy by reinstating the mechanic.⁹¹ However, these judges disagreed with the plurality view that *Misco* requires a court to defer to an arbitrator's findings as to the effectiveness of the proposed discipline, as well as to an arbitrator's findings relating to the subject matter of the underlying dispute.⁹² This position is suspect, though, in light of *Eastern Associated Coal*. The Justices indicated that under federal labor law, policy questions about the appropriateness of discipline are best resolved in arbitration, not courts.⁹³

This second dissent also criticized the way the plurality explained a court's authority to engage in public policy review, which seemed to give arbitrators the power to address questions of public policy that *Misco* intended for the courts to decide.⁹⁴ Ultimately, a clear majority of the judges in *Stead Motors* agreed that public policy was not violated by reinstating the mechanic, provided he received some discipline to correct his reckless behavior, because no public policy expressly forbade the reinstatement of an employee who had endangered others by his conduct.⁹⁵

The narrow view, taken by the Ninth Circuit in *Stead Motors*, of court authority to review awards under the public policy exception makes vacatur of arbitration decisions in that circuit very unlikely. Under this interpretation, legislatures seemingly need to authorize guidelines for implementing statutory policy goals that specify all the harms they wish to prevent as well as any conceivable penalties they may wish to impose in order for parties to successfully cite these policies to challenge a contrary award. This narrow

⁸⁹ *Id.* at 1216–17.

⁹⁰ *Id.* at 1219, 1224. (Trott, J., dissenting).

⁹¹ *Id.* at 1225. (Wallace, J., dissenting).

⁹² *Id.* at 1225–26.

⁹³ In *Eastern Associated Coal*, the Justices noted that when courts evaluate public policy challenges they must examine the “relevant statutory and regulatory provisions . . . in light of background labor law policy that favors determination of disciplinary questions through arbitration . . .” *E. Associated Coal Corp. v. UMWA*, Dist. 17, 121 S. Ct. 462, 468 (2000).

⁹⁴ *Stead Motors*, 886 F.2d at 1227.

⁹⁵ *Id.* at 1217, 1225.

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approach does not allow for the possibility that public policy might be explicit, dominant, and well-defined by looking at the totality of law in an area, even if a specific circumstance is not literally stated in a particular rule or regulation. Though the public policy exception was meant to be narrow, this approach seems too deferential.

The justices in *Misco* clearly intended some, albeit narrow, public policy review.⁹⁶ Under the Ninth Circuit approach even the most glaring disparity between an arbitrator's decision as to an employee's discipline and his actual conduct could not be challenged as violating public policy absent some express proscription against the terms of an arbitrator's award. This raises a virtually insurmountable barrier to challenges based on the public policy exception and ignores the potential danger to the public or to those in the workplace potentially created by an individual's continued employment.⁹⁷

V. TRANSPORTATION SAFETY AND PUBLIC POLICY

Many courts try to uniformly apply the safety sensitive employment cases invoking the public policy exception. Most of these cases are, however, distinguishable in terms of the nature of the risks involved and the appropriate regulatory scheme. One series of decisions involves employers seeking vacatur of awards reinstating employees to jobs involving transportation of passengers or hazardous materials. Many of these cases, like the ones dealing with workplace safety, involve drug or alcohol abuse by the discharged employee.

A key factor distinguishing cases involving transportation employees from cases involving employees in power plants or refineries is that with transportation employees there are few, if any, backup safety systems for containing the risks to the general public or the environment following an accident. Consequently, the direct risks associated with an employee's misconduct in this context are arguably greater in scope and immediacy, except of course in the event of an uncontrolled nuclear or chemical accident.

⁹⁶ *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 42-43 (1987).

⁹⁷ *See, e.g., Dyno Nobel, Inc., v. United Steelworkers*, 77 F. Supp. 2d 307, 309-10 (N.D.N.Y. 1999). In this case the court refused to vacate an award reinstating an explosives plant employee who committed "reckless" acts on more than one occasion. The employer cited New York State regulations governing workplace safety in plants manufacturing explosives, as well as federal regulations issued by OSHA, the Bureau of Alcohol, Tobacco, and Firearms, and the U.S. Department of Transportation, in arguing that read together these provisions constituted clear, well-defined, and dominant public policy against the reinstatement of this employee to his former position. The court, following the *Niagara Mohawk* cases and *Stead Motors*, found no policy expressly forbade reinstatement and refused to vacate the award, which it deemed "regrettable." *Id.* at 309-10.

Since transportation is a heavily regulated industry, parties' seeking vacatur can point to many sources of public policy when challenging the terms of an award. For these reasons several courts have taken broad views of their roles in applying the public policy exception to this area.

For example, three cases in the Third Circuit involving Exxon employees engaged in transportation of hazardous materials all held that it is a violation of public policy to reinstate such employees after they were found to have abused drugs or alcohol on the job.⁹⁸ In the first case, *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon I)*,⁹⁹ the Third Circuit found that broad public policy exists forbidding individuals from working in the operation of common carriers in any capacity, while under the influence of alcohol or drugs.¹⁰⁰

The employee in this case was a helmsman who failed a drug test after his oil tanker ran aground.¹⁰¹ The circuit court defined the appropriate question under *Misco* as determining whether the award was inconsistent with some express, well-defined, and significant public policy, adopting what it deemed as a broad approach to public policy review.¹⁰² The court concluded that reinstating the employee would be contrary to public policy, since it would "thwart achievement of the overriding interest in public safety furthered by [it]."¹⁰³

In the second case, also captioned *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon II)*,¹⁰⁴ the Third Circuit closely followed its previous

⁹⁸ *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon I)*, 993 F.2d 357 (3d Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon II)*, 11 F.3d 1189 (3d Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon III)*, 73 F.3d 1287 (3d Cir. 1996).

⁹⁹ *Exxon I*, 993 F.2d 357 (3d Cir. 1993).

¹⁰⁰ *Id.* at 360–62. The employer cited various Coast Guard regulations which stated that individuals who failed drug tests could not be employed in "duties which directly affect the safe operation of the vessel" and such individuals could not be returned to work until "drug free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work." (quoting Required Chemical Testing, 46 C.F.R. § 16.201(c) (2000) and Standards for Chemical Testing for Dangerous Drugs, 46 C.F.R. § 16.370(d) (2000)). The employer also cited similar regulations applied by other transportation agencies, including the Federal Aviation Administration Drug Testing Program, 14 C.F.R. pt. 121 at App. I (2000), the Federal Railroad Administration Control of Alcohol and Drug Use, 49 C.F.R. pt. 219 (1999), and the Federal Highway Administration Controlled Substances and Alcohol Use and Testing, 49 C.F.R. pt. 382 (1999).

¹⁰¹ *Id.* at 358.

¹⁰² *Id.* at 363.

¹⁰³ *Id.* at 364.

¹⁰⁴ *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon II)*, 11 F.3d 1189 (3d Cir. 1993)

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decision. Here a seaman working aboard another oil tanker reported for work while intoxicated and was discharged.¹⁰⁵ The award reinstating him was vacated and the Third Circuit, citing the same policies as in *Exxon I*, affirmed.¹⁰⁶ The judges repeated their concerns about creating danger to the public by allowing physically unfit individuals to perform duties aboard maritime vessels, noting the general public as well as the employer should not have to risk more accidents.¹⁰⁷ While acknowledging that courts must show significant deference to arbitration decisions, the Third Circuit reasoned that the potential danger created by enforcement of the award justified invoking the public policy exception and vacating the award.¹⁰⁸

Finally, the last case in the *Exxon* trilogy, *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon III)*,¹⁰⁹ involved the discharge of an oil tanker pump worker who refused to take a drug test.¹¹⁰ Unlike the employees in the previous cases his duties did not involve navigation or operation of the vessel itself but rather loading and unloading its cargo, although his position was still deemed safety sensitive.¹¹¹ The employer discovered drugs in his room during a random search and ordered him to take a drug test, but he refused and was discharged. It was unclear whether the drugs in the room actually belonged to him, so he was reinstated by the arbitration panel reviewing his discharge, but he was still disciplined for insubordination in refusing to take the test.¹¹²

In *Exxon III* the Third Circuit reaffirmed its earlier holdings that a court engaging in public policy review under *Misco* can vacate an award that is inconsistent with the express, well-defined, and dominant public policy of preventing employment of drug users in the operation of common carriers.¹¹³

¹⁰⁵ *Id.* at 1191.

¹⁰⁶ *Id.* at 1194-96.

¹⁰⁷ *Id.* at 1195-96.

¹⁰⁸ *Id.* at 1196.

¹⁰⁹ *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon III)*, 73 F.3d 1287 (3d Cir. 1996).

¹¹⁰ *Id.* at 1289-90.

¹¹¹ *Id.* at 1289.

¹¹² *Id.* at 1290-91. The arbitrator noted that the employee should have obeyed and then filed a grievance.

¹¹³ *Id.* at 1292-93. The reasoning of the Third Circuit in the *Exxon* trilogy was closely followed by the First Circuit in a case involving another Exxon employee who was discharged from his job as the driver/loader of a tractor trailer carrying gasoline after he failed a drug test. *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 847-49 (1st Cir. 1997). For another example of a case articulating the public policy against employment of persons who abuse drugs or alcohol in the operation of surface transportation, see *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir.

However, the court here affirmed the lower court decision that his reinstatement was proper because the arbitrator had determined insufficient cause existed in the first place to justify the drug test under the collective bargaining agreement, and such a determination was not a basis for public policy vacatur.¹¹⁴ The judges agreed his refusal to take a drug test was insubordination and indicated that they would have reached a different result on the public policy question had there been reasonable cause for the test.¹¹⁵ They also expressly declared that reinstatement of employees to safety sensitive positions, who refuse to take drug tests in situations where reasonable cause exists for drug testing, would violate public policy.¹¹⁶

As with the Fifth Circuit cases discussed earlier, the Third Circuit's broad approach to public policy review is now suspect in light of *Eastern Associated Coal*. However, given that statutory and regulatory schemes differ on a case by case basis, and that statutes and regulations constantly change, it cannot be said that *Eastern Associated Coal* entirely forecloses public policy vacatur of any award involving transportation employees.

In *Eastern Associated Coal*, the Justices examined a broad regulatory scheme issued under the Omnibus Transportation Employee Testing Act of 1991.¹¹⁷ In determining that the reinstatement of a commercial truck driver following a second positive test was not prohibited by these regulations, the court reviewed the regulations concerning suspension of commercial licenses, as well as rehabilitation and follow up testing. It seems likely that public policy would have been violated by an award reinstating the driver without assurance that the rehabilitation and follow up testing guidelines required by DOT regulations were met, or if the award compelled Eastern to return the driver to safety sensitive employment prior to completing treatment. But since the award imposed severe discipline, mandated

1993) (vacating the reinstatement of a railroad brakeman who failed a drug test administered following an accident).

¹¹⁴ *Exxon III*, 73 F.3d at 1295.

¹¹⁵ *Id.* at 1294.

¹¹⁶ *Id.* at 1294-95. The court went so far as to state that a contrary result would "radically undermine" its holdings in *Exxon I* and *II*. Despite this pronouncement from the Third Circuit, it is not always clear that an award reinstating an employee who refused to take a drug test based on reasonable cause would violate public policy. See *Trinity Indus. v. United Steelworkers*, 891 F. Supp. 342, 348-49 (N.D. Tex. 1995) (holding that where an arbitrator reinstates employees who refused to submit to drug tests based on reasonable cause, public policy is not violated where the arbitrator found the employees' due process rights were violated because they were not informed of the evidence placing them under suspicion).

¹¹⁷ 49 U.S.C. § 31306 (1994 & Supp. 2000).

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rehabilitation prior to reinstatement and continued testing, and imposed a last chance agreement, it was consistent with the regulations.¹¹⁸

Courts have generally recognized that public policy requires anyone entrusted with the lives and safety of the traveling public to fulfill their duties in a safe manner.¹¹⁹ Such a view is further exhibited by a public policy case involving an airline pilot who was discharged for flying while intoxicated. In *Delta Airlines, Inc. v. Air Line Pilots Ass'n International*,¹²⁰ the employer sought to vacate an award ordering a pilot's reinstatement, as well as payment of the discharged pilot's alcohol rehabilitation costs by the airline. This pilot drank heavily the night before an early morning flight and appeared intoxicated to the crew when reporting for flight duty.¹²¹ Nevertheless, he piloted a full aircraft without incident. Upon reaching the plane's destination he was reported for flying while intoxicated and given a blood alcohol test, which he failed. He was discharged one week later.¹²²

The System Board hearing grievances under the applicable collective bargaining agreement ruled in a divided opinion that just cause did not exist for discharge because the pilot was not offered the chance to receive any rehabilitation counseling, which was generally offered by the airline to employees who abused alcohol.¹²³ The panel ordered reinstatement without back pay, but also awarded the discharged pilot the costs of his participation in a separate rehabilitation program.¹²⁴ The employer subsequently appealed the award.¹²⁵

The district court vacated this award on the grounds that ordering reinstatement of this pilot would violate the well-defined and dominant public policy against allowing intoxicated pilots to operate aircrafts.¹²⁶ In affirming this result, the Eleventh Circuit defined its inquiry under *Misco* in terms of whether an award conflicts with well-defined and dominant public

¹¹⁸ E. Associated Coal Corp. v. UMWA, Dist. 17, 121 S. Ct. 462, 468–69 (2000).

¹¹⁹ NLRB v. Dixie Motor Coach Corp., 128 F.2d 201, 203 (5th Cir. 1942) (refusing on public policy grounds to enforce an NLRB reinstatement order for a bus driver who was terminated for driving while intoxicated).

¹²⁰ Delta Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 666 (11th Cir. 1988).

¹²¹ *Id.* at 667. The crew later testified that he appeared disoriented and that his breath smelled of liquor.

¹²² *Id.* at 667–68.

¹²³ *Id.* at 668.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 669. Delta's *Flight Operations Procedures Manual* states that the "[u]se of intoxicating beverages . . . within 24 hours prior to departure of a flight is prohibited." *Id.* at 668.

policy as it relates to an employee's conduct which is "*integral to the performance of employment duties*."¹²⁷ The court next recognized that federal aviation regulations, as well as forty state statutes forbidding the operation of airplanes while intoxicated, constituted explicit, well defined and dominant public policy against this pilot's conduct, satisfying the first element of public policy review.¹²⁸

The judges went on to conclude that the pilot had violated public policy in the performance of his duties and as such his reinstatement violated the dominant public policy prohibiting his conduct.¹²⁹ It characterized his improper conduct as "inextricably related" to the performance of his job, which in the court's view compelled vacatur on public policy grounds.¹³⁰ However, despite this pronouncement by the Eleventh Circuit that awards reinstating pilots who flew while intoxicated violated well-defined and dominant public policy, other courts have refused to vacate similar awards on these grounds.¹³¹

Overall, myriad jurisprudence has developed addressing public policy review of arbitration awards that implicate safety concerns. These cases indicate that several federal circuit courts take broad views of their power to vacate awards on public policy grounds when safety is potentially at risk, whether from employee substance abuse or willful disregard for safety protocols. While such broad analysis seems suspect following *Eastern*

¹²⁷ *Id.* at 671. The Eleventh Circuit also stated that *Misco* required courts to determine whether there was "an established public policy condemn[ing] the performance of employment activities in the manner engaged in by the employee." *Id.* This seems similar to the approach taken by the Sixth Circuit in *Monroe Auto Equipment*, which refused to vacate an award reinstating an employee whose drug abuse was not shown to have affected nor was likely to so impair his job performance that public policy compelled his discharge. *Monroe Auto Equip. Co. v. UAW*, Local 1878, 981 F.2d 261 (6th Cir. 1992).

¹²⁸ *Delta Airlines*, 861 F. 2d at 672-74.

¹²⁹ *Id.* at 674.

¹³⁰ *Id.* Here again a court seems to be applying a job performance impairment model for *Misco* public policy analysis when comparing an award to the relevant positive law.

¹³¹ See *Northwest Airlines, Inc. v. Air Line Pilots Assoc'n Int'l*, 808 F.2d 76, 83 (D.C. Cir. 1987). In this case, decided prior to *Misco* but still part of the common law of the District of Columbia Circuit, the court reversed a district court's finding that reinstatement of a pilot who operated an airplane within 24 hours after consuming alcohol violated public policy. The court reasoned that no public policy forbade conditional reinstatement of this pilot following his completion of an alcohol treatment program and re-certification by the FAA as being fit to fly, both specific terms of the award issued by the System Board of Adjustment hearing his grievance. *Id.* Here the D.C. Circuit took a narrow view of its power to review awards for public policy violations under pre-*Misco* jurisprudence such as *W.R. Grace*, which it has continued to apply since *Misco*.

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Associated Coal, it is not prohibited and a court's decision will depend principally on the scope of the positive law at issue. The public policy exception is narrow, but various courts have demonstrated their willingness to reject traditional court deference to arbitration when concerned about transportation safety.

VI. DRUGS IN THE WORKPLACE GENERALLY

The public policy cases dealing with employees in safety sensitive jobs involving drug or alcohol abuse demonstrate how reluctantly some courts uphold awards reinstating drug users. When these employees work in safety sensitive areas there is an increased likelihood that their conduct will endanger themselves, their co-workers, or the general public. Consequently, several courts have taken a broad view of judicial authority to vacate awards on public policy grounds that reinstate drug abusers to safety sensitive jobs.

However, where safety concerns are not directly implicated courts have frequently refused to vacate awards on the grounds that reinstating drug users violates general public policy in favor of eliminating drug use in the workplace. While such policy is arguably as important as maintaining safety in hazardous work facilities and in transportation, where safety is not directly implicated, the scope of judicial authority under the public policy exception to vacate awards reinstating drug users seems narrower since fewer sources of positive law bar reinstatement.

In *Saint Mary Home, Inc. v. Service Employees International Union Dist.1199*,¹³² the Second Circuit upheld an award reinstating an employee who was discharged for possession of and intent to distribute marijuana. The employee had been arrested following an argument with a co-worker that led to a minor assault.¹³³ During a search of the employee the police found marijuana and drug paraphernalia.¹³⁴ He was charged with possession of marijuana with intent to sell it as well as assault in the third degree.¹³⁵ He was subsequently discharged for fighting and for possessing marijuana on the job.¹³⁶

¹³² *Saint Mary Home, Inc. v. SEIU Dist.1199*, 116 F.3d 41 (2d Cir. 1997).

¹³³ *Id.* at 42.

¹³⁴ *Id.*

¹³⁵ *Id.* at 42-43. The police discovered "three-quarters of an ounce of marijuana, several empty plastic bags, plastic tweezers, and a small scale." *Id.* at 42. Eventually all the charges were reduced to one count of possession of marijuana. He was placed in a rehabilitation program for a probationary period, the successful completion of which would result in dismissal of the charges and the clearing of his criminal record. *Id.* at 43.

¹³⁶ *Id.* at 43.

The arbitrator hearing the employee's grievance contesting this penalty found no just cause existed for discharging the employee for either the assault or the drug possession, reasoning that the employee had no other major disciplinary problems over his long employment history and there was no evidence that the employee was actually dealing drugs.¹³⁷ The employer then challenged this award as to the drug charges as a violation of the "well defined and dominant public policy against possession, sale and distribution of illegal drugs, a public policy that is even more important in the workplace."¹³⁸

The Second Circuit acknowledged that strong public policy exists against the use and sale of illegal drugs, citing various statutes and regulations offered by the employer.¹³⁹ However, the court determined that nothing supported the position that public policy would be violated by simply suspending, rather than dismissing, this employee.¹⁴⁰ In distinguishing several of the safety sensitive employment cases where awards reinstating drug users were vacated, the court noted that the public policy forbidding reinstatement in those instances was more explicit and did not directly pertain to employees in the health care field.¹⁴¹

The Second Circuit's decision in *Saint Mary Home* demonstrates how courts engaging in public policy review of awards must be persuaded that an arbitrator's treatment of the offending conduct at issue in applying the language of the parties' contract creates sufficient conflict with well-defined and dominant public policy to overcome judicial deference to arbitration. It is insufficient that illegal conduct like drug use is contrary to public policy; in order for the award to violate public policy its express terms, an interpretation of the parties' contract, must be contrary to the policy as

¹³⁷ *Id.* The arbitrator, reviewing all the evidence, did find just cause for a seven month suspension.

¹³⁸ *Id.* at 45 (quoting Appellant's brief).

¹³⁹ *Id.* at 46. Some of this authority included materials cited in safety sensitive employment cases, such as the Drug Free Workplace Act of 1998, 41 U.S.C. § 701 (Supp. IV 1998).

¹⁴⁰ *Saint Mary Home*, 116 F.3d at 46.

Nowhere does the [employer] point to an established policy that calls for a fixed disciplinary action of permanent dismissal in all cases where drug related conduct occurs in the workplace. Rather, it appears that the public policy relating to the response for drug related conduct in the workplace is flexible and remedial.

Id.

¹⁴¹ *Id.* at 46-47. The court noted that in many safety sensitive employment cases the discharged employees created life threatening risks by abusing drugs while on the job, and indicated that comparable public policy scrutiny would be appropriate for health care employees with similar responsibilities, such as doctors, nurses, or emergency medical technicians. *Id.*

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well.¹⁴² As such, absent a clear regulatory prohibition on reinstating drug users, it is difficult to demonstrate that reinstatement of a drug user is contrary to clear, well-defined and dominant public policy.

This narrow public policy review of awards reinstating drug users to non safety-sensitive jobs is not limited to the Second Circuit. The Eighth Circuit addressed this subject in *Alvey, Inc. v. Teamsters Local Union No. 688*.¹⁴³ In this case police received an anonymous tip that Dewey Bounds, an employee at the company plant, was dealing drugs.¹⁴⁴ Bounds was stopped after leaving the plant and a search of a bag in his car turned up drug paraphernalia and traces of cocaine.¹⁴⁵

Bounds was eventually found guilty of possession of drug paraphernalia and given two years probation.¹⁴⁶ The company discharged him but an arbitrator ruled that no just cause existed for dismissal and ordered him reinstated with full back pay.¹⁴⁷ The employer sought to vacate the award on various grounds, including that it violated well-defined and dominant public policy against illegal drugs in the workplace.¹⁴⁸ The Eighth Circuit, like the Second Circuit, acknowledged the existence of this public policy but

¹⁴² *Id.* at 47. The Second Circuit revisited these issues when reviewing the reinstatement of an employee who came to work under the influence of prescription drugs and alcohol in *First Nat'l Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892 (2d Cir. 1997). Here the employee, a store manager, arrived for work impaired by prescription drugs and alcohol, as evinced by his shouting and disorientation during his shift. *Id.* at 894. At a hearing he admitted to taking a combination of prescription drugs and also admitted that he brought a weapon onto company property. *Id.* Following his discharge, an arbitrator reinstated him, reducing his termination to a suspension. *Id.* at 895. The arbitrator reasoned that although the employee's misconduct violated company rules this did not necessarily constitute just cause for dismissal because there was no indication that he had consumed alcohol while on the job so as to require his automatic termination. *Id.* The Second Circuit rejected an appeal on public policy grounds. *Id.* at 897-98 (citing *Saint Mary Home*, 116 F.3d 41).

¹⁴³ *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209 (8th Cir. 1997).

¹⁴⁴ *Id.* at 1210.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1210. This occurred prior to the arbitration hearing for his grievance.

¹⁴⁷ *Id.* at 1211. At his hearing the criminal court decision was placed into evidence and police officers testified that following his arrest Bounds admitted the drug paraphernalia was his, but Bounds testified in the hearing that he had never seen it and that somebody could have planted it on him. The arbitrator ruled that because of this uncertainty as to the origin of the drug paraphernalia there was no just cause for dismissal or even discipline. *Id.*

¹⁴⁸ *Id.* at 1212. The district court granted summary judgment to the union, but the circuit court reversed, ruling that the "award did not draw its essence from" the collective bargaining agreement allowing employees to be discharged for drug offenses because the arbitrator had too narrowly construed the term "possession" in the contractual work rules. *Id.* at 1213.

reasoned that, based on the arbitrator's interpretation of the facts, there was no basis for finding a clear violation of any aspects of the policy.¹⁴⁹

Illegal drug use in any workplace, regardless of whether an employee holds a safety-sensitive job, is a serious concern. Employee drug abuse creating danger to others in the workplace is contrary to well-defined and dominant public policy under *Misco*.¹⁵⁰ The public policy against drug use in society in general has been widely articulated, but absent a showing that an employee's drug use creates safety concerns it is very unlikely that an award reinstating that employee will violate public policy.¹⁵¹ This general opposition to drug use in the workplace, no matter how widely articulated, has been insufficient to vacate awards reinstating employees who abused drugs but created no safety hazards.¹⁵²

VII. SEXUAL HARASSMENT PREVENTION AND PUBLIC POLICY REVIEW

Sexual harassment cases present a broad range of policy issues that may be violated in arbitration awards. Since the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the

¹⁴⁹ *Id.* at 1212. For another case in which the Eighth Circuit addressed an arbitrator's reduction of discipline for an employee found to have violated company drug policy, see *Int'l Bhd. of Teamsters, Local 878 v. Commercial Warehouse Co.*, 84 F.3d 299 (8th Cir. 1996) (finding that an arbitrator's holding to discharge an employee who failed a drug test, but was granted back pay from the time of discharge until the date the hearing began because of company procedural delays during preparation for the hearing, did not violate well-defined and dominant public policy against illegal drug use in the workplace).

¹⁵⁰ See *Pepsi Cola-Albany Bottling Co. v. Int'l Bhd. of Teamsters, Local 669*, No. 96-CV-1986, 1998 U.S. Dist. LEXIS 8760, at *10 (N.D.N.Y. June 10, 1998) ("Clearly there exists a public policy aimed at preventing employees from performing safety-sensitive jobs while under the influence of illegal drugs or alcohol.").

¹⁵¹ In addition to the aforementioned decisions in the Second and Eighth Circuit, for other examples see *Container Corp. of Am. v. United Paperworkers Int'l Union, Local 208*, No. CV-93-5773 SVW, 1994 WL 803270, at *3 (C.D. Cal. Mar. 31, 1994) (ruling that the reinstatement of an employee who possessed marijuana on company premises did not violate public policy); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999) (affirming the district court's decision to refuse to vacate on public policy grounds an award reinstating a truck driver who failed a drug test where the arbitrator read the contract as requiring evidence of on the job impairment for disciplinary action, despite Utah law allowing employers to conduct general drug tests and use the results as a basis for disciplinary action).

¹⁵² *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999); see also Bernard F. Ashe, *Arbitration Finality and the Public Policy*, DISP. RESOL. J., Sept. 1994, at 22.

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workplace, there is no question that such conduct need not be tolerated by an individual's coworkers or employer.¹⁵³ The public policy against sexual harassment in the workplace has expanded through statutes, regulations, and common law in order to address the pervasive harm stemming from it, and arbitrators reviewing cases involving sexual harassment risk violating this large body of public policy. This risk is clear because certain courts have not hesitated to vacate awards when it is determined that reinstating a sexual harasser undermines well-defined and dominant public policy against sexual harassment in the workplace.¹⁵⁴

For instance, in *Newsday, Inc. v. Long Island Typographical Union, No. 915*,¹⁵⁵ the Second Circuit affirmed a district court decision vacating an award which reinstated a repeat sexual harasser. On a prior occasion this employee had been disciplined for disorderly conduct, which was characterized by that arbitrator as "offensive and unauthorized contact" with certain female employees.¹⁵⁶ Though in a prior case a different arbitrator reinstated the grievant, that arbitrator suggested any subsequent improper conduct of a similar nature would be sufficient grounds for immediate discharge.¹⁵⁷

Still, following another incident the employee was again discharged for sexual harassment of female coworkers.¹⁵⁸ This time another arbitrator also found the employee guilty of repeated episodes of physical sexual harassment but instead of following the previous award the arbitrator gave the employee one final chance to save his job.¹⁵⁹

¹⁵³ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

¹⁵⁴ For analyses of public policy review of sexual harassment cases in the context of labor arbitration, as well as problems arbitrators are often faced with in this area, see Douglas E. Ray, *Sexual Harassment, Labor Arbitration and National Labor Policy*, 73 NEB. L. REV. 812, 825-29 (1994); see also Tim Bornstein, *Arbitration of Sexual Harassment*, in *ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE* 109 (Gladys W. Gruenberg, ed. 1991).

¹⁵⁵ *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990).

¹⁵⁶ *Id.* at 842.

¹⁵⁷ *Id.* ("Any action on the part of [the grievant] which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leniency.").

¹⁵⁸ *Id.* On this occasion the employee was charged with "brushing up" against female coworkers as well as placing his hands on them. These events occurred at least three times following his reinstatement.

¹⁵⁹ *Id.* at 843. The arbitrator acknowledged the earlier decision but found that immediate discharge was not warranted at that time, ruling that "any similar offensive

A district court vacated this award, finding it contrary to clear public policy against sexual harassment in the workplace.¹⁶⁰ The Second Circuit agreed, holding that reinstatement of an employee who was already on notice that further acts of sexual harassment would result in discharge, and yet repeated his misconduct anyway, effectively undermined the public policy against sexual harassment in the workplace.¹⁶¹

Newsday seems like a clear case for vacatur on public policy grounds based on the strength of the policy to prevent sexual harassment in the workplace, the repeated conduct of the employee, and the failure of the second arbitrator to enforce the warning issued by the first one that this employee faced discharge for any repeat offense.¹⁶² Still, given that the Second Circuit takes a narrow view of judicial review under the public policy exception,¹⁶³ it is unlikely that this court or most other federal circuit courts would vacate the reinstatement of an employee found to have committed a single act of sexual harassment.

Other circuit courts have already taken the position that where an arbitrator determines an employee undisputedly committed a single act of sexual harassment but could still be rehabilitated, ordering reinstatement following a suspension would not violate public policy.¹⁶⁴ Further, reinstatement of an employee who admitted to a pattern of harassing conduct would also not necessarily violate public policy.¹⁶⁵

behavior" should result in discharge. In effect his award was another "last chance" for the employee.

¹⁶⁰ *Id.* The district court ruled that reinstatement of a "chronic" sexual harasser would "permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment."

¹⁶¹ *Id.* at 845. The court also noted that reinstatement of this employee would impede the employer's ability to prevent sexual harassment in its workplace, an important consideration given the vicarious liability employers face under Title VII for the actions of their employees.

¹⁶² Unlike the arbitrator here, many arbitrators don't give repeat employee sexual harassment offenders a second chance. *Ind. Mich. Power Co.*, 103 LA 248 (1994). In fact, when a grievant is reinstated under a binding "last-chance" agreement any violation usually results in termination. *ABTCO Inc.*, 104 LA 551 (1995).

¹⁶³ *IBEW, Local 97 v. Niagara Mohawk Power Corp. (Niagara I)*, 143 F.3d 704 (2d Cir. 1998).

¹⁶⁴ *Chrysler Motors Corp. v. Int'l Union*, 959 F.2d 685, 689 (7th Cir. 1992); *Communication Workers v. S.E. Elec. Coop.*, 882 F.2d 467, 469 (10th Cir. 1989).

¹⁶⁵ *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971, 977 (4th Cir. 1999) (reversing the vacatur of an award reinstating an admitted sex harasser being disciplined for the first time, noting that "[t]here is no public policy that every harasser must be fired.").

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However, in *Stroehmann Bakeries Inc. v. Local 776, International Brotherhood of Teamsters*,¹⁶⁶ the Third Circuit determined that an arbitrator had violated public policy by reinstating an employee without making any factual finding as to the merits of his discharge for a single incident of sexual harassment. In this case the employee, a delivery truck driver, was discharged after a complaint by a store employee who alleged that the driver had grabbed at her and made sexually explicit remarks during a delivery to her store.¹⁶⁷ An arbitrator reviewing the driver's grievance ruled that discharge was inappropriate because the employer had insufficiently investigated the alleged incident of sexual harassment before acting against the employee.¹⁶⁸ A district court then vacated this award as contrary to explicit, well-defined, and dominant "public policy against sexual harassment in the workplace."¹⁶⁹

The Third Circuit affirmed the district court, holding that reinstatement violated the well-defined and dominant public policy against sexual harassment in the workplace because it "would allow a person who may have committed sexual harassment to continue in the workplace."¹⁷⁰ In reaching this conclusion the court dismissed the notion that the public policy against sexual harassment in the workplace had not been violated by an award reinstating a sex harasser based on concerns for industrial due process, namely the employer's failure in the view of the arbitrator to adequately substantiate the charges.¹⁷¹ In the court's view the failure of the arbitrator to consider the merits of the charges of sexual harassment against the grievant before ordering his reinstatement was deemed sufficiently contrary to the

¹⁶⁶ *Stroehmann Bakeries Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992).

¹⁶⁷ *Id.* at 1438.

¹⁶⁸ *Id.* at 1440, 1448. The arbitrator ruled that there was no just cause for discharging the employee because the employer had taken this action before adequately investigating the charges of sexual harassment, not because the evidence demonstrated that the grievant was innocent of the charge. *Id.* at 1440. Indeed in his opinion the arbitrator noted that it was the failure of the employer to present sufficient evidence substantiating the charge of sexual harassment, as opposed to a lack of severity in the alleged misconduct, which required his refusal to uphold the employee's discharge. *Id.* at 1448.

¹⁶⁹ *Id.* at 1440.

¹⁷⁰ *Id.* at 1442. In the court's view such a result would also undermine an employer's statutory obligation under Title VII to prevent the occurrence of sexual harassment in its workplace. *Id.*

¹⁷¹ *Id.* at 1444-445. The majority opinion noted that even if there had been a violation of industrial due process in the course of the investigation and subsequent grievance proceedings, such failures by the employer could not "override all other public policy concerns." *Id.* at 1445 n.7. The court added that in its view "a labor arbitrator's concept of industrial due process does not override a definitive public policy." *Id.*

well-defined and dominant public policy against sexual harassment as to require vacatur.¹⁷²

Prevention of sexual harassment is unquestionably a well-defined and dominant public policy for the purposes of *Misco* public policy review. Still, its application under the public policy exception to overturn reinstatement of sex harassers has produced mixed results despite the serious harms sexual harassment creates in the workplace. Though this conduct is offensive in any context and contrary to widespread public policy, perhaps since it does not create the same levels of physical danger to public health and safety as reinstatement of employees to safety sensitive jobs, the reinstatement of a sex harasser is less likely to be vacated on public policy grounds.¹⁷³

VIII. VIOLENCE IN THE WORKPLACE

Violence at work is prevalent today.¹⁷⁴ Employers have an obligation to provide safe working environments for their employees, and many argue that they should not be compelled to tolerate physical assaults by employees against co-workers, supervisors, or others in their places of business that would not be tolerated in society at large.¹⁷⁵ Still, strict judicial deference to

¹⁷² *Id.* at 1442. One district court has also held that an arbitrator violated public policy by reinstating an employee discharged for sexual harassment because of procedural failures by the employer in taking the disciplinary action without considering the merits of the underlying sexual harassment charge. *United Transp. Union v. Burlington N. R.R.*, 864 F. Supp. 138 (D. Or. 1994). However, another court rejected a public policy challenge to an arbitrator's finding of no just cause for the discharge of a sexual harasser on the grounds that it would amount to "disparate treatment" of the grievant, even though the factual circumstances indicated sexual harassing conduct had occurred. *Communication Workers of Am. v. Bell Atlantic-W. Va.*, 27 F. Supp. 2d 66 (D.D.C. 1998).

¹⁷³ The Seventh Circuit drew this distinction in a footnote to *Chrysler Motors Corp. v. International Union*, distinguishing its case from safety sensitive cases where the employees engaged in conduct rendering them unfit to perform duties "integral to their employment" in ways which "jeopardized public health or safety." 959 F.2d 685, 689 n.3 (7th Cir. 1992). See also the reasoning by the Fourth Circuit in *Westvaco Corp. v. United Paperworkers International Union*, 171 F.3d 971, 977 n.2 (4th Cir. 1999), which stated, "We do not have before us conduct that compromises the performance of a safety-sensitive job."

¹⁷⁴ According to one article, "over two million people are physically attacked in the workplace annually and another six million are threatened with violence while at work." Margaret A. Lucero & Robert E. Allen, *Fighting on the Job*, DISP. RESOL. J., Aug. 1998, at 51.

¹⁷⁵ This issue received nationwide attention following an assault on December 1, 1997 by Latrell Sprewell, a professional basketball player for the Golden State Warriors of the National Basketball Association, against his head coach P.J. Carlesimo during a

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arbitrators' authority is very evident in this area. Despite the fact that criminal law and tort law constitute an overwhelming basis for clear, well-defined, and dominant public policy against acts or threats of physical violence, and laws and regulations require the maintenance of safe workplaces,¹⁷⁶ courts have consistently refused to vacate on public policy grounds arbitration awards reinstating employees who threaten or commit acts of violence.

For instance, in *United States Postal Service v. National Ass'n of Letter Carriers*,¹⁷⁷ the Third Circuit reversed a district court's decision to vacate on public policy grounds an arbitrator's award reinstating a postal employee who fired two bullets into the windshield of his supervisor's car. The employee had alleged he was a victim of racial discrimination after being repeatedly passed over for promotion and on the morning before his offense he had again been told he would not be promoted.¹⁷⁸ The arbitrator determined that the employee had been propelled to act violently by this perceived racial animus, and since he had no prior record of discipline suspension was the appropriate penalty.¹⁷⁹

A federal district court vacated this award on public policy grounds, prior to the Supreme Court issuing its decision in *Misco*, on the basis of "an indisputable public policy against permitting an employee to direct physical violence at a superior, and an equally compelling policy against forcing that superior to again employ the man."¹⁸⁰ The Third Circuit reversed this decision, stating that *Misco* required reviewing courts to find a violation of

team practice. The resulting arbitration award which found no just cause for termination of Sprewell's employment contract with the Warriors, and reduced his league-imposed suspension from one year to the eight months for the remaining 1997-1998 season, was heavily criticized. *In re Nat'l Basketball Players Ass'n et. al.*, 548 PLIPAT 429 (1998); see Tim Keown, *Irrational Act Follows Another*, SAN FRANCISCO CHRON., Mar. 5, 1998 at D1. Interestingly, Sprewell challenged the resulting award on several grounds, including that it was contrary to California public policy against racial discrimination on the basis that the award's dual punishment fomented racial animus. This argument, along with the remainder of his appeal, was rejected by the Ninth Circuit in *Sprewell v. Golden State Warriors*, 231 F.3d 520 (9th Cir. 2000).

¹⁷⁶ Section 5 of the Occupational Safety and Health Act requires employers to provide working environments free from "hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1) (1994).

¹⁷⁷ *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988).

¹⁷⁸ *Id.* at 147.

¹⁷⁹ *Id.* The arbitrator deemed the employee's thirteen years of discipline free employment a "bank of good will" which combined with his excellent job performance led him to conclude that if reinstated this employee was unlikely to repeat any acts of violence. *Id.*

¹⁸⁰ *Id.* at 148 (quoting *United States Postal Service*, 663 F. Supp. at 119-20).

some explicit, well-defined and dominant public policy in order to vacate an award and no such policy existed requiring discharge of employees for acts of violence.¹⁸¹

In subsequent cases the Third Circuit still interpreted the meaning of "well defined and dominant" public policy in this way but no longer insisted that the public policy at issue require discharge in order to find a violation. The court now applies the more lenient "inconsistent with public policy" test.¹⁸² Despite this broader approach, in *G.B. Goldman Paper Co. v. United Paperworkers International Union, Local 286*,¹⁸³ a district court refused to vacate on public policy grounds an award reinstating an employee who threatened and intimidated coworkers by verbal taunts and menacing acts.

In *Goldman*, the court determined that in order to vacate this award on public policy grounds, it had to find that the reinstatement of an employee who manifests violent tendencies and may harm others expressly violates public policy in favor of ensuring workplace safety.¹⁸⁴ The court discussed both *United States Postal Service* and *E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association of East Chicago, Inc.*,¹⁸⁵ in applying a test for determining whether "workplace safety public policy" is violated that considers such factors as determining what danger a grievant presents to others as well as a grievant's amenability to lesser discipline.¹⁸⁶ These cases involved reinstatement of violently behaving employees, but in more recent cases involving nonviolent employees the Third Circuit has applied broader public policy scrutiny.¹⁸⁷

¹⁸¹ *Id.* Here the Third Circuit interprets *Misco* as forbidding courts from asserting the existence of a public policy without substantiating the laws and legal precedents on which it is based, stating this is what differentiates "well-defined and dominant" public policy from general concerns about public welfare. *Id.* (quoting *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757, 766 (1983))).

¹⁸² *Exxon Shipping Co. v. Exxon Seamen's Union (Exxon I)*, 993 F.2d 357 (3d Cir. 1993). In *Stroehman Bakeries Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992), the Third Circuit also took a broad view of public policy review by vacating an award which "may" have violated public policy.

¹⁸³ *G.B. Goldman Paper Co. v. United Paperworkers Int'l Union, Local 286*, 957 F. Supp. 607 (E.D. Pa. 1997).

¹⁸⁴ *Id.* at 619-21.

¹⁸⁵ *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611 (7th Cir. 1986).

¹⁸⁶ *G.B. Goldman Paper Co.*, 957 F. Supp. at 620 (quoting *E.I. DuPont de Nemours & Co.*, 790 F.2d at 617).

¹⁸⁷ See *Exxon I-III*, *supra* note 98.

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Though the approach of the district court in *Goldman* mirrors that of courts in other jurisdictions that adhere to narrow views of *Misco* review,¹⁸⁸ the court in *Goldman* ignored the broader “inconsistent with public policy” test prevailing in the Third Circuit. It is unclear why an award reinstating a demonstrably violent employee deserves unique treatment when it may violate safety public policy meant to prevent workplace violence.

At least one district court in another jurisdiction has followed *Goldman*,¹⁸⁹ even though it seems contrary to the prevailing law governing public policy review in the Third Circuit. Given the increased frequency and seriousness of current incidents of violence in the workplace, broader review of awards implicating these concerns may ensue as public policy in this area becomes more specific and prevalent.

IX. PATIENT ABUSE AND MEDICAL NEGLIGENCE

Public and private health care facilities for the mentally ill or infirm are heavily regulated by federal law.¹⁹⁰ This is to guarantee adequate standards of care for clients in these facilities and to protect them from potential abuses. Such health care providers are therefore subject to strong public policies in favor of protecting patients from abusive or negligent caregivers, and as such awards reinstating abusive health care employees may be vacated.¹⁹¹

Nevertheless, despite clear and dominant public policy favoring protection of patients, courts have still applied the public policy exception narrowly when reviewing awards which reinstated abusive employees. In *Jacksonville Area Association for Retarded Citizens v. General Service Employees Union, Local 73*,¹⁹² a district court upheld an award reinstating

¹⁸⁸ *Int'l Union v. Micro Mfg.*, 895 F. Supp. 170 (E.D. Mich. 1995) (granting summary judgment to union on finding that no public policy forbids reinstatement of an employee who physically assaults the owner of the company); *Colum. Aluminum Corp. v. United Steelworkers, Local 8147*, 922 F. Supp. 412 (E.D. Wash. 1995) (refusing to vacate on public policy grounds an award reinstating an employee who had a physical altercation with a coworker, noting that no public policy barred his reinstatement).

¹⁸⁹ *Bunting Bearings Corp. v. Local 7450*, 158 L.R.R.M. (BNA) 2991 (N.D. Ohio 1998) (holding that no public policy forbids reinstatement of an employee who spat in the face of a coworker, citing *G.B. Goldman Paper Co.*, 957 F. Supp. 607.).

¹⁹⁰ Mental Health Systems Act of 1980, Pub. L. No. 96-398, 94 Stat. 1564 (codified as amended in scattered sections of 42 U.S.C.); Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801-51 (1994 & Supp. IV 1998).

¹⁹¹ *Highland Hosp. v. AFSCME Dist. 84*, 1996 U.S. Dist. LEXIS 1287 (vacating an award which reinstated a patient care assistant who shoved an Alzheimer's patient).

¹⁹² *Jacksonville Area Ass'n for Retarded Citizens v. Gen. Serv. Employees Union, Local 73*, 888 F. Supp. 901, 908 (C.D. Ill. 1995).

four employees of a not-for-profit corporation providing services to physically and mentally impaired individuals after these employees abused a patient but did not cause physical injury. The arbitrator found that though the employees' behavior was clearly improper, discharge was unwarranted.¹⁹³ In refusing to vacate the award on public policy grounds the court noted that despite significant public policy against any abuses of mentally impaired individuals, reinstatement of these employees did not violate any specific expressions of that policy.¹⁹⁴

Further, in *Maggio v. Local 1199*,¹⁹⁵ a district court upheld an award reinstating an employee who on several occasions had physically mistreated patients in a residential nursing and health care facility. Here the employee was discharged following reports of physical abuse of four elderly patients.¹⁹⁶ However, an arbitrator reviewing the case determined that the employee's "rough handling" of these patients was not intended to harm them, and ruled that suspension was the appropriate penalty.¹⁹⁷

Both the employer and the state commissioner responsible for oversight of such private nursing facilities sought to vacate the award on the grounds it violated explicit public policy against mistreatment of patients in nursing facilities.¹⁹⁸ While the district court acknowledged that the reinstatement of a patient abuser would clearly violate public policy, it still refused to vacate this award.¹⁹⁹

¹⁹³ *Id.* at 904. The arbitrator reasoned that a suspension without back-pay was sufficient discipline.

¹⁹⁴ *Id.* at 908. ("[T]he JAARC cannot identify any statute or regulation that prohibits the *reinstatement* of the employees under the circumstances . . ."). The court described the conduct of these employees as "revolting" and amounting to mental abuse clearly contrary to public policy but found itself bound by a narrow interpretation of the public policy exception requiring that their reinstatement also had to be forbidden in order to vacate the award. *Id.* at 909.

¹⁹⁵ *Maggio v. Local 1199*, 702 F. Supp. 989 (E.D.N.Y. 1989).

¹⁹⁶ *Id.* at 990.

¹⁹⁷ *Id.* at 991. The arbitrator reasoned that the employee was merely careless in his conduct, rushing his work at times and not realizing how his size and strength could cause discomfort to the patients in his care. *Id.*

¹⁹⁸ *Id.* at 993. The employer specifically pointed to N.Y. Pub. Health L. § 2803-c, which outlines the rights of patients in private residential health care facilities to receive proper treatment and protection from mental and physical abuses, and § 2803-d, which requires reporting and investigation of instances of "suspected 'physical abuse, mistreatment or neglect'" of patients in such facilities. *Id.*

¹⁹⁹ *Id.* at 996. ("If Maggio's characterization [of the grievant as a patient abuser] were correct, the Court would be inclined to agree that reinstatement violated public policy.").

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The court reasoned the arbitrator's determination that discharge was unwarranted because the employee's conduct was unintentional in fact reinforced the public policy at issue because it supported the view that any intentional abuse by nursing home employees would lead to their discharge.²⁰⁰ In drawing this distinction between negligent and intentional abuse the court ruled that the public policy at issue was not undermined because there was an insufficient link between reinstatement of this employee and violation of the policy forbidding abuse of patients, a requirement the court believed was inherent to the reasoning of the justices in *Misco*.²⁰¹

This analysis is also instructive when reviewing cases where health care employees were reinstated after misconduct or negligence in the performance of their duties. Employers may seek to terminate health care employees who commit isolated, inadvertent mistakes simply because they are concerned about potential tort liabilities. While a pattern of poor job performance and additional misconduct will likely result in an arbitrator upholding an employee's discharge,²⁰² single acts of negligent conduct may only lead to suspension.²⁰³ Consequently, awards reinstating medical employees who have committed isolated acts of negligence may violate public policy depending on the nature and frequency of past errors.

For instance, courts have refused to vacate awards reinstating medical employees who committed acts of negligence despite the fact their employers deemed them unfit to perform their jobs. In *Brigham & Women's Hospital v. Massachusetts Nurses Ass'n*,²⁰⁴ a federal district court upheld an arbitrator's award reinstating a nurse who in the opinion of her superiors was incapable of fulfilling her duties. This nurse had been reprimanded on more than one occasion for disobeying superiors, leaving patients unattended, failing to promptly notify doctors when a patient's condition changed rapidly for the

²⁰⁰ *Id.* ("Indeed, a fair reading of the Award reveals that the arbitrator's opinion is completely in line with the policy [at issue].").

²⁰¹ *Id.* at 992. ("Fatal to vacation of the award [in *Misco*] was the lower court's failure to demonstrate a sufficient link between enforcement of the award and violation of the previously identified public policy.").

²⁰² *Titusville Hosp.*, 86 LA 597, 599-600 (1985) (upholding the discharge of a nurse who on more than one occasion administered improper doses of medication and then tried to cover up her errors, noting that while even the most competent nurses make errors failure to report such mistakes warrants discharge).

²⁰³ *Wis. Dep't of Health & Soc. Serv.*, 90 LA 333, 337 (1998) (upholding the three day suspension of a nurse who medicated a patient and failed to prepare a record of it afterwards).

²⁰⁴ *Brigham & Women's Hosp. v. Mass. Nurses Ass'n*, 684 F. Supp. 1120 (D. Mass. 1988).

worse, and generally failing to meet basic nursing standards.²⁰⁵ The hospital finally discharged her after she failed to properly administer a patient's medication.²⁰⁶ However, the arbitrator refused to uphold her discharge, citing the hospital's failure to follow its own disciplinary policies in reaching its decision.²⁰⁷

The hospital sought to vacate the award on the grounds it violated Massachusetts public policy in favor of employing only competent persons as registered nurses.²⁰⁸ The reviewing court acknowledged that state regulations establishing qualifications for registered nurses constituted sufficiently well-defined and explicit public policy under *Misco* favoring employment of only competent nurses.²⁰⁹ However, the court refused to vacate on these grounds because the arbitrator did not find her incompetent to perform her duties when deciding she should be reinstated, and as such her reinstatement did not violate public policy.²¹⁰

Had the arbitrator in *Brigham* agreed with the hospital and determined that the nurse was incompetent but still reinstated her due to the hospital's procedural failures when taking disciplinary action, it seems likely given the court's reasoning that the award would have violated public policy. Since the job performance of a health care employee so directly affects the well being of individual patients, arbitrators must be especially wary of violating public policy by reinstating medical employees who are demonstrably negligent in performing their job duties.²¹¹

²⁰⁵ *Id.* at 1121.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1122. The arbitrator determined that no just cause existed for discharge because of 1) the hospital's failure to follow its own disciplinary rule to "forgive" certain misconduct after one year, effectively wiping it off an employee's personnel record, 2) its failure to notify the employee, in accordance with hospital policy, of negative comments about her performance, and 3) its failure to demonstrate that her conduct fell within one of three categories of terminable offenses: "gross" misconduct, conduct for which an employee had already received two warnings, or conduct for which an employee had already been suspended. The arbitrator also felt the employee was subjected to disparate treatment since other nurses had committed equally serious mistakes without any penalties. *Id.*

²⁰⁸ *Id.* at 1125. The hospital pointed to relevant Massachusetts administrative regulations in support of its argument.

²⁰⁹ *Id.* at 1125. ("[T]he Hospital is arguably correct in asserting the regulations establish a public policy that RN's be competent.").

²¹⁰ *Id.* at 1125. The court opined that her conduct amounted to failures to follow proper procedures rather than incompetence and noted that she had an excellent work record apart from these incidents. *Id.*

²¹¹ *Russell Memorial Hosp. Ass'n. v. United Steelworkers*, 720 F. Supp. 583, 587 (E.D. Mich. 1989) (rejecting *Brigham* and finding that reinstatement of a licensed nurse who was reprimanded more than once for improper work and insubordination and who

PUBLIC POLICY REVIEW OF ARBITRATION AWARDS

However, even where courts have recognized clear and well-defined public policy exists favoring safe and competent nursing care, awards reinstating medical employees who executed their duties negligently will not be disturbed. In *Mid Michigan Regional Medical Center-Clare v. Professional Employees Division of Local 79*,²¹² the Sixth Circuit confirmed an award which reinstated a nurse who had mishandled equipment during an emergency and on other occasions. The court noted that an award reinstating a hospital employee who makes “frequent, life-threatening errors” would violate public policy.²¹³ However, in this instance the arbitrator had not ordered the nurse to be reinstated to an emergency unit where such errors would be more likely to occur.²¹⁴

Despite concerns about arbitrators reinstating poorly performing medical employees, it is also unlikely that an arbitrator would violate public policy by merely deciding that a certain employee is suitably qualified for a medical position, even if this award is contrary to the professional opinions of a hospital’s staff.²¹⁵ Arbitrators are selected to interpret and fulfill the parties’ intent as expressed in the terms of a contract, and in doing so receive wide latitude despite the public policy exception or other forms of review. In cases involving medical personnel, like others, the standard for public policy review will be strict and absent express provisions on an individual’s return to a medical position public policy vacatur is very unlikely.

also failed to properly administer cardiac medication violated the public policy, as expressed in Michigan’s licensing requirements for nurses, in favor of ensuring safe and competent nursing care). *Contra* UPMC, Braddock v. Teamsters Local 250, Int’l Bhd. Of Teamsters, 32 F. Supp.2d 231 (W.D.Pa. 1998) (distinguishing *Russell* in affirming award reinstating with a ninety day suspension a psychiatric technician who negligently failed to keep a suicidal patient under observation and thereby placed the patient in jeopardy, but also determining that such negligent failure to perform medical duties did violate public policy favoring protection of the mentally ill because the relevant statutes expressing that policy do not distinguish between intentionally and negligently created dangers to psychiatric patients).

²¹² *Mid Mich. Reg’l Med. Ctr.-Clare v. Prof’l Employees Div. of Local 79*, 183 F.3d 497 (6th Cir. 1999).

²¹³ *Id.* at 504.

²¹⁴ *Id.* at 500–01.

²¹⁵ *N. Adams Reg’l Hosp. v. Mass. Nurses Ass’n*, 889 F. Supp. 507, 513–14 (D. Mass. 1995), *aff’d on other grounds*, 74 F.3d 346 (1st Cir. 1996) (holding that the arbitrator did not violate public policy by awarding a staffing position to an internal candidate where the hospital determined that only an external candidate selected by medical staff was sufficiently qualified for the open position; while the arbitrator agreed that the external candidate was more qualified, the internal candidate was at least “minimally” qualified and hence entitled to the position under the terms of the collective bargaining agreement).

X. CONCLUSION

In the post *Misco* era the requirement for courts to find a violation of clear, well-defined, and dominant public policy has made it very unlikely that an arbitrators' award will be vacated on these grounds. But it is also clear that arbitration awards implicating public policy are not completely shielded. Courts may vacate on public policy grounds awards reinstating employees who create physical danger to themselves or others, awards reinstating employees likely to repeat sexually harassing conduct, or awards reinstating chronically negligent medical employees. Whether a court will do so largely depends on whether the particular reviewing court looks for violations of public policy in the misconduct of the employee or the terms of the arbitrator's award. The various federal circuit courts should all apply the narrow approach, examining the terms of an award for violations of public policy since it is those terms which reflect the parties' contractual agreement. As illustrated herein arbitrators who reinstate employees found to have committed certain conduct may still risk vacatur on public policy grounds if in the totality of the relevant positive law there exists some prohibition against the treatment of that conduct in the terms of an award. Parties who have agreed to arbitrate their contractual disputes should remain aware of the ever changing and expanding body of statutes, regulations, and even common law on which public policy may be based, because awards resolving their disputes may be successfully challenged on these grounds. Like a "Hail Mary" pass such challenges will occasionally, though very infrequently, succeed.